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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

PATSY T. MINK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1971 (Pet. App. B). The petition for a

writ of certiorari was filed on January 13, 1972, and was granted on March 6, 1972 (App. 64). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the district court may make an *in camera* inspection of secret and top secret documents exempt from disclosure under 5 U.S.C. 552(b)(1) ("required by Executive order to be kept secret in the interest of the national defense or foreign policy") for the purpose of releasing portions of such documents which it may find to be "non-secret components."

2. Whether the district court may review *in camera* documents exempt from disclosure under 5 U.S.C. 552(b)(5) (inter-agency memoranda), for the purpose of selecting and making available to the public portions of such memoranda which the court determines are "factual" and not "inextricably intertwined with policymaking processes."

STATUTE AND EXECUTIVE ORDERS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, and pertinent portions of Executive Order 10501, as amended, 3 C.F.R. 292 (Jan 1, 1971), are reproduced in the appendix, *infra*, pp. .

STATEMENT

Respondents, 33 members of Congress, instituted this action in the district court in August 1971 pur-

suant to the Freedom of Information Act, 5 U.S.C. 552, to compel the release to them of documents prepared for the President in connection with the underground nuclear test scheduled for Amchitka Island, Alaska [1] (App. 3-13).

The government moved to dismiss the action, or in the alternative for summary judgment, on the ground that the requested materials were specifically exempted from disclosure under exemptions 1 and 5 of that Act (5 U.S.C. 552(b)(1) and (5)) (App. 26). Exemption 1 excludes from disclosure matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Exemption 5 excludes from disclosure "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." In support of its motion the government filed an affidavit of John N. Irwin, II, the Under Secretary of State (App. 27-32). The affidavit states that in January 1969, the President established an "Under Secretaries Committee", of which Mr. Irwin was Chairman and which was part of the National Security Council System. The Committee, as described by the President to Con-

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[1] A separate action was brought in the district court to enjoin the test itself. *Commitee for Nuclear Responsibility, Inc.* v. *Seaborg* (D.D.C., Civil Action No. 1346-71). In that case, this Court denied an application for an injunction on November 6, 1971, *Committee for Nuclear Responsibility, Inc.* v. *Schlesinger*, 404 U.S. 917, and the Amchitka test (known as ("Cannikin") was conducted on that date.

gress, "links the process of policy formulation to the operations of the Government" (App. 27).

The affidavit then describes the assignment the President gave to the Committee regarding underground nuclear testing:

> 3. On June 27, 1969, the President directed the Under Secretaries Committee to review the annual underground nuclear test program and to encompasss within this review requests for authorization of specific scheduled tests. He directed that the Committee consider the policy and technical justification for the proposed tests to determine whether they are consistent with the requirements of national security and foreign policy. He requested that the results of the Committee's review of the underground nuclear tests programs and its recommendations be transmitted to him in time to allow him to give them full consideration before the scheduled events. [App. 27-28.]

Pursuant to that presidential direction, the Under Secretaries Committee prepared a report for the President on the underground test "Cannikin." Paragraph 5 of the affidavit listed and described the documents in the report:

> In accordance with the foregoing directions from the President, the Under Secretaries Committee has prepared a report upon the proposed underground nuclear test known as Cannikin consisting of the following:
>
> A. A memorandum prepared by me to the President dated July 17, 1971. This memoran-

dum is classified as Top Secret and as Restricted Data.

B. Attached to that memorandum to the President was a report of the Under Secretaries Committee on the proposed Cannikin test. This report is classified Top Secret and as Restricted Data. The following documents were attached to this report:

1. A letter from the Chairman of the Atomic Energy Commission to the Chairman of the Under Secretaries Committee, myself. This letter is separately classified Secret and separately as Restricted Data.[2]

2. A report of the Defense Program Review Committee, the Chairman of which is Dr. Henry Kissinger. This report is separately classified as Top Secret and separately as Restricted Data.

3. The Environmental Statement Cannikin, dated June 1971, by the United States Atomic Energy Commission. This document is publicly available and a copy is attached as Exhibit C.

4. A transcript of a briefing by the Atomic Energy Commission on Cannikin given orally to the Under Secretaries Committee. This document is separately classified as Secret and separately as Restricted Data;[3] and

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[2] Parts of this letter were ordered disclosed to the plaintiffs in the discovery proceedings in the action brought to enjoin the test. The *Committee for Nuclear Responsibility* v. *Seaborg*, (D.D.C. Civil Action No. 1346-71) order of November 2, 1971. We do not seek relief with respect to the materials disclosed in that litigation (See also nn. 3, 4).

[3] Parts of this transcript were also ordered disclosed to the plaintiffs in the *Nuclear Responsibility* discovery order of November 2, 1971, n. 2, *supra*.

5. A memorandum to me from the Council on Environmental Quality. This memorandum is an attachment to the classified report and is separately unclassified.[4]

C. In addition, letters containing recommendations were transmitted to me regarding the proposed test known as Cannikin by Mr. William D. Ruckelshaus for the Environmental Protection Agency, by Mr. Russell Train, for the Council on Environmental Quality and by Dr. Edward E. David, Jr., for the Office of Science and Technology. Each of these three letters is classified Top Secret and as Restricted Data.[5]

The documents described in this paragraph, except for item B3 above, were prepared solely for the purpose of giving advice to the President and involve, except for item B5 above, highly sensitive matter that is vital to our national defense and foreign policy. They were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying view-

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[4] This memorandum, with certain deletions, was also ordered released during the discovery in the *Nuclear Responsibility* litigation. The released portions are reproduced in the appendix to the Brief for the Respondents in Opposition.

[5] The Environmental Protection Agency has advised us that Mr. Ruckelshaus' letter has been declassified. Mr. Train's letter was classified only because it was to be attached to the Undersecretary's Report. We do not rely upon Exemption 1 of the Act as a ground for nondisclosure of these documents but rely solely upon Exemption 5. See, *infra*, pp. 17, n. 12; 30-42.

points and have been used for no other purpose. [App. 28-29.]

Mr. Irwin further stated (*ibid.*) that the documents described as "Top Secret" and "Secret" had been classified pursuant to Executive Order No. 10501, and that those described as Restricted Data had been classified pursuant to the Atomic Energy Act of 1954 (42 U.S.C. 2014(Y), 2161, and 2162). He also pointed out (App. 30) that he had "sought to make publicly available as much information as possible consistent with the needs of national defense and foreign policy" and that certain information about the yield of the test had, at his request, been made public by the Defense Department (See Exhibit E to Irwin Affidavit, Record in District Court, filed with the Clerk of this Court). However, the "information in the documents described in this affidavit which is not public necessarily is held in strict confidence by the Government in order to prevent grave damage to our national defense and foreign policy interests" (App. 30).

The district court, without *in camera* inspection, held that the documents were "exempted from compelled disclosure by 5 U.S.C. 552(b)(1) and * * * 5 U.S.C. 552(b)(5)" (Pet. App. 32-33). Accordingly it granted the government's motion for summary judgment, and dismissed the action[*] (Pet. App. 33).

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[*] The district court also dismissed the action insofar as plaintiffs sought relief in their capacity as members of Congress (Pet. App. 32). Since the court of appeals did not

The court of appeals reversed and remanded the case to the district court for *in camera* inspection of the documents and a determination whether disclosure should be ordered as to some of the materials in the Report. The court ruled with respect to classified documents that a document that is separately unclassified cannot be withheld "merely because it has been incorporated into a secret file" (Pet. App. 26),[7] and that a document marked "Secret" only because it is to become part of a secret file cannot be withheld if it "would not have been independently classified as secret" (*id.*, p. 27). The court further ruled that documents classified "top secret" or "secret" pursuant to Executive Order 10501, should be reviewed to permit disclosure of any "non-secret components [which] are separable from the secret remainder and may be read separately without distortion of meaning" (Pet. App. 27). The court further held that documents which the government claimed were within the Information Act's Exemption for inter-agency or intra-agency memoranda (Exemption 5) were to be reviewed *in camera* to permit disclosure "of factual information unless it is inextricably intertwined with policymaking processes" (Pet. App. 28).

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rule on that aspect of the case, it has no direct bearing on the issues in this Court. We discuss this matter briefly at n. 8, *infra*.

[7] We do not challenge this particular ruling, but note that any such document in this case would in any event come within Exemption 5 of the Act (see *infra*, pp. 30-42).

SUMMARY OF ARGUMENT

I

The documents in this case which have been classified "Top Secret" or "Secret" pursuant to Executive Order 10501, are exempt, in their entirety, from compulsory disclosure by Exemption 1 of the Freedom of Information Act (5 U.S.C. 552(b)(1)). That exemption excepts from the disclosure requirements of the Act "matters * * * specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." The legislative history of Exemption 1 shows that it was intended to cover documents, such as those at issue in the present case, which have been so classified pursuant to Executive Order 10501. See, *e.g.*, H. Rep. No. 1497, 89th Cong., 2d Sess., pp. 9-10 (1966), and 112 Cong. Rec. 13659.

Notwithstanding the fact that these documents were classified under Executive Order 10501, and are thus exempt from compelled disclosure under the Act, the court below ordered an *in camera* inspection of the materials and the disclosure of any portions the district court might find to be "non-secret" components. That ruling improperly injects the court into a domain which has long been recognized to be within the peculiar discretion of the Executive.

Congress intended by Exemption 1 to accord broad respect for the Executive's decision as to the classification of government documents in the interest of national defense and foreign policy. The relevant de-

cisions of other courts construing the Exemption, as well as this Court's decision in *United States* v. *Reynolds*, 345 U.S. 1, confirm that the courts may not review documents such as these in order to release to the public materials the court determines to be "non-secret."

II

All of the documents at issue here also are protected in their entirety from disclosure by Exemption 5 of the Act (5 U.S.C. 552(b)(5)), which exempts "matters that are * * * inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Exemption 5 was intended to incorporate the principle of discovery law that "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" are privileged against disclosure. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C.), affirmed, 384 F. 2d 979 (C.A. D.C.), certiorari denied, 389 U.S. 952. The documents in the present case are precisely the kind of documents Exemption 5 was intended to cover, since they were prepared solely for the purpose of advising the President on a nuclear test.

The legislative history of Exemption 5 shows that Congress intentionally broadened the scope of earlier drafts of the provision to protect the confidentiality of factual material in advisory memoranda. The

court of appeals' order that these documents be reviewed *in camera* for the purpose of disclosing factual material frustrates the purpose of Exemption 5 of encouraging frank discussion of all aspects of a problem in advisory memoranda. Moreover, Exemption 5 permits compelled disclosure only of documents which would "routinely" be made available in discovery (H. Rep. No. 1497, *supra* at 10); these sensitive documents would not routinely be made available to a litigant in discovery.

ARGUMENT

Introduction

The Freedom of Information Act[8] is a revision of Section 3 (the public information section) of the Administrative Procedure Act, 5 U.S.C. 1002 (1964 ed.). The basic reason for the Freedom of Information Act was Congressional concern that "[a]lthough the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information." S. Rep. No. 813, 89th Cong., 1st Sess., p. 3 (1965) (hereafter S. Rep. No. 813). Congress concluded that the former public information section was "full of loopholes which allow agencies to deny legitimate information to the public" (*ibid.*).

The former public information section provided for disclosure of public records "to persons properly and

[8] Originally enacted in 1966 as P.L. 89-487, 80 Stat. 250, the Act was codified in 5 U.S.C. 552 by P.L. 90-23, 81 Stat. 54.

directly concerned * * *." 5 U.S.C. 1002(c) (1964 ed). The present statute, however, directs that public information and records shall be made available "to the public" and "to any person." 5 U.S.C. 552 (a) and (c). See H. Rep. No. 1497, 89th Cong., 2d Sess., p. 1 (1966) (hereafter "H. Rep. No. 1497"). The new law recognized "the basic right of any person—not just those special classes 'properly and directly concerned'—to gain access to the records of official Government actions" (*id.*, at p. 5); and it "establishes the basic principle of a public records law by making the records available to any person" (*id.*, at p. 8). See also S. Rep. No. 813, at pp. 5-6; Davis, *Administrative Law Treatise*, 1970 Supp., § 3A.4, pp. 120-121.[9]

---

[9] It follows that under the Freedom of Information Act the fact that respondents are Congressmen gives them no greater rights than "any person" or the "public." Indeed, the Act does not purport to deal with the preexisting rights of the Congress as such to obtain information from government agencies through its own processes. Thus, Subsection (c) of the Act (5 U.S.C. 552(c)), states that "[t]his section [*i.e.*, the Act itself] is not authority to withhold information from Congress." The House Report explains that "a law controlling public access to Government information has absolutely no effect upon congressional access to information. Members of the Congress have all the rights of access guaranteed to 'any person' by S. 1160, and the Congress has additional rights of access to all Government information which it deems necessary to carry out its functions." H. Rep. 1497, at 11-12. The footnote to that quoted statement refers to p. 23 of the 1965 House Hearings, where Congressman Moss stated:

[Footnote continued on page 13]

The Freedom of Information Act provides "workable standards for what records should and should not be open to public inspection," in the place of what Congress viewed as the unsatisfactorily broad generalizations contained in the old public information section. See S. Rep. No. 813, p. 5. It places heavy emphasis upon increasing the availability to the public of "agency law," *e.g.*, final opinions of agencies, orders made in the adjudication of cases, statements of policy and interpretations, and administrative staff manuals and instructions that affect a member of the public. 5 U.S.C. 552(a)(2); see S. Rep. No. 813, at pp. 6-7; H. Rep. No. 1497, at pp. 7-8.[10] It also added a specific provision, 5

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[9] [Continued]

> Mr. Moss. I would like to clarify one thing. This is not intended to affect the rights of the Congress. This is dealing with a public right, this proposed legislation.
>
> * * * *
>
> Mr. Moss. Only with a public right. And Congress can, as an equal branch, use its own rights and privileges in seeking to get its information.
>
> This proposed bill does not affect the rights of the Congress.

Hearings before a Subcommittee of the House Committee on Government Operations, "Federal Public Records Law," 89th Cong., 1st Sess. (March and April 1965), at 23. See also, *id.* at 143, 157; S. Rep. No. 813 at 10.

[10] See *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d 696 (C.A.D.C.). The new law also required agencies to make public all final votes of agency members (5 U.S.C. 552 (a) (4)); to keep a current index of their orders, opinions, etc. (5 U.S.C. 552 (a) (2) (c)); and to make public concurring and dissenting opinions (5 U.S.C. 552 (a) (2) (A)).

U.S.C. 552(a)(3), for judicial review of wrongful agency withholding of public records. S. Rep. No. 813 at p. 5-6. Such judicial review had not theretofore been available.

Although the Freedom of Information Act was designed to make available to the public considerably more information than had previously been accessable, Congress also recognized that government operations could not be conducted effectively unless the confidentiality of certain material could be maintained. Subsection (b) of the Act thus expressly exempts from disclosure nine categories of records. As the Senate Committee explained (S. Rep. No. 813, at p. 3):

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.
>
> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and pro-

tects all interests, yet places emphasis on the fullest responsible disclosure.[11]

The President reiterated that the Act reflects a balancing of competing interests. On approving the Freedom of Information Act, he stated (2 Weekly Compilation of Presidential Documents 895, July 11, 1966):

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. * * *
>
> At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be able in confidence to complain to his Government and to provide information, just as he is—and should be—free to confide in the press without fear of reprisal or being required to reveal or discuss his sources.
>
> Fairness to individuals also requires that information accumulated in personnel files be pro-

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[11] Similarly, the House Committee stated (H. Rep. No. 1497, at p. 6):

> It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests.

> tected from disclosure. Officials within Government must be able to communicate with one another fully and frankly without publicity. * * *
>
> I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people. Moreover, this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. There are some who have expressed concern that the language of this bill will be construed in such a way as to impair Government operations. I do not share this concern.

With these general considerations in mind, we now contend that the documents sought by respondents here—materials prepared solely for the purpose of advising the President on the merits of the Amchitka nuclear test—are exempt in their entirety from the Act's disclosure requirements, and that the decision below seriously misconstrues the applicable exemptions.

I

Exemption 1 of the Act Protects From Disclosure or *In Camera* Inspection the Documents Classified "Top Secret" or "Secret" Pursuant to Executive Order 10501.

Respondents, under the Freedom of Information Act, seek to obtain disclosure of documents that have been classified "Top Secret" or "Secret" pursuant to Executive Order 10501. We submit that those documents are exempt in their entirely from the Act's

disclosure requirements by virtue of Exemption 1, 5 U.S.C. 552(b)(1).[12] As a necessary corollary, the court below erred in directing *in camera* inspection of those documents for the purpose of disclosing any portions thereof.

---

[12] The specific documents for which Exemption 1 is now claimed are:

1. The Top Secret memorandum prepared by Under Secretary Irwin for the President, dated July 17, 1971 (Irwin Affidavit Paragraph 5A).
2. The Top Secret Report of the Under Secretaries Committee on the Cannikin test (Irwin Affidavit Paragraph 5B).
3. The Top Secret report of Dr. Kissinger's Defense Program Review Committee (Irwin Affidavit Paragraph 5B2).
4. Those portions of the transcript (classified Secret) of the oral briefing given by AEC to the Under Secretaries Committee, which were not released in the Nuclear Responsibility case (see n. 3 *supra*) (Irwin Affidavit Paragraph 5B4).
5. The Top Secret recommendation letter of Dr. Edward E. David, Jr., Chairman, Office of Science and Technology (Irwin Affidavit Paragraph 5C).

We do not rely on Exemption 1 with respect to Mr. Ruckelhaus' letter which has now been declassified nor with respect to the letter of Mr. Train, which was classified in anticipation that it would be attached to the Under Secretaries Committee Report, both of which are listed in Paragraph 5C. See n. 5, *supra*. We do, however, contend that these letters are exempt from disclosure under Exemption 5, *infra*, pp. 30-42.

In addition, Exemption 1 is claimed for any classified matters which were excised from the material released in the *Nuclear Responsibility* case, *supra*, n. 2.

A. *The Exemption Bars Disclosure of Documents Classified as Top Secret or Secret.*

Exemption 1 exempts from the Act's disclosure requirements "matters * * * specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." The legislative history of that exemption shows that the exemption protects from disclosure governmental records, such as those sought here, which have been classified as Top Secret or Secret pursuant to the authority granted by Executive Order 10501 to classify material "in the interest of the national defense." [13]

The House Report stated with respect to the Exemption that "* * * citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501." H. Rep. No. 1497, at pp. 9-10. Similarly, Representative Gallagher, a member of the House Committee, explained the exemption as follows (112 Cong. Rec. 13659):

> There has been some speculation that in strengthening the right of access to Government

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[13] Executive Order 10501 will be superseded effective June 1, 1972, by Executive Order 11652, 37 F.R. 5209. The argument in the text respecting legislative recognition of Executive Order 10501 in Exemption 1 applies equally to that successor Order, since it will provide the analogous source of authority for the classification of government documents "in the interest of national defense or foreign relations * * *." 37 F.R. 5209.

> information, the bill, as drafted, may inadvertently permit the disclosure of certain types of information now kept secret by Executive order in the interests of national security.
>
> Such speculation is without foundation. The committee, throughout its extensive hearings on the legislation and its subsequent report, has made it crystal clear that the bill in no way affects categories of information which the President—as stated in the committee report—has determined must be classified to protect the national defense or to advance foreign policy. These areas of information most generally are classified under Executive Order No. 10501.

Representative Moss, Chairman of the House Sub-Committee which considered the bill, stated during the House Hearings that Exemption 1 "was intended to specifically recognize that Executive order [No. 10501]" and is drafted "in conformity with that Executive Order." Hearings before a Subcommittee of the House Committee on Government Operations, "Federal Public Records Law," 89th Cong., 1st Sess. (March and April 1965) (hereafter: "1965 House Hearings"), pp. 52, 105.[14]

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[14] This legislative history lays to rest any contention that Exemption 1 requires the President to issue separate orders for each document he seeks to protect from disclosure under the Act. As long as a record is classified pursuant to Executive Order 10501 (and perforce any successor order) Exemption 1 applies. The language in the Exemption that the matter be "specifically required by Executive order to be kept secret" means only that the document must come under the applicable Executive Order which "specifically requires" secrecy.

The documents involved in this case, which have been classified "Top Secret" or "Secret" pursuant to Executive Order 10501, are on their face "matters * * * specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Executive Order 10501 establishes the categories of "Top Secret" and "Secret" as the highest classification of official information affecting the national defense (*id.*, § 1; Pet. App. 3) and requires that "[k]nowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense, and only if they have been determined to be trustworthy" (*id.*, § 7; App. *infra*, p. 51). Such information may only "be disseminated outside the executive branch * * * under conditions and through channels authorized by the head of the disseminating department or agency * * *" (*id.*, § 7(b); App. *infra*, p. 52). Undersecretary Irwin's affidavit states (App. 29) that these documents, which relate to a recent nuclear test, involve "highly sensitive matter that is vital to our national defense and foreign policy." The documents are thus exempt from the disclosure requirements of the Freedom of Information Act.

B. *The Courts Are Not Authorized to Declassify Those Portions of Documents Classified as Top Secret or Secret that They Conclude Are Improperly Classified.*

The court of appeals held that despite the classification of the documents as "Top Secret" or "Se-

cret" pursuant to Executive Order 10501, the district court should examine the documents *in camera* and permit disclosure of any portions which it finds are "non-secret components [which] are separable from the secret remainder and may be read separately without distortion of meaning * * *" (Pet. App. 27).

There is nothing in Exemption 1 that justifies this procedure. The statute exempts from disclosure material "required by Executive order to be kept secret in the interest of the national defense or foreign policy." Once documents have been classified as "top secret" or "secret" pursuant to that Executive order, they are protected against disclosure. As the legislative history discussed above shows, the intent of Congress in providing Exemption 1 was, in the words of Representative Gallagher, to protect the confidentiality of "areas of information * * * classified under Executive Order No. 10501" (112 Cong. Rec. 13659).

The effect of the decision of the court of appeals is to require the courts to review the classifications made by the Executive Branch of documents relating to national security and foreign affairs and to permit them to substitute their judgment with respect to the proper classification of material for that of the Executive. If the courts have this power, there is no reason why its exercise should be limited to declassifying portions of the document. The rationale of the court of appeals would also permit a court to declassify an entire document which it concludes was improperly classified.

To permit the courts to engage in this procedure would not only embark them upon a venture that they are ill-adapted to perform, but would also constitute an unfortunate and inappropriate judicial incursion into areas which, under our system of separation of powers, necessarily are committed to the Executive Branch because of their intimate relationship to national defense and foreign affairs.

1. Mr. Justice Stewart recently summarized the reasons for this conclusion in his concurring opinion in *New York Times Co.* v. *United States*, 403 U.S. 713, 727-730 (emphasis added):

> * * * [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. * * * [W]ithin our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.
>
> I think there can be but one answer to this dilemma, if dilemma it be. *The responsibility must be where the power is.* If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. * * *

This Court previously had articulated and applied this principle in *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103. In holding unreviewable a Presidential decision modifying an order of the Civil Aeronautics Board awarding international air routes, even though "a literal reading of [the review statute] subjects this order to re-examination by the courts" (*id.* at 110), the Court rejected the possibility that the courts could appropriately review the Presidential action *in camera*. It stated (p. 111):

> * * * The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to be-

> long in the domain of political power not subject to judicial intrusion or inquiry.[15]

In providing Exemption 1, Congress intended that the action of the Executive Branch in classifying particular documents as "Top Secret" or "Secret" in the interest of national defense or foreign policy would be respected. See *supra* pp. 18-19. In response to criticism that the Act did not adequately protect the Executive's right to avoid disclosure of information whose confidentiality the national interest requires, Representative Moss stated during the House Hearings (1965 House Hearings at 14-15):

> We do not challenge that right to withhold for the national interest, because we specifically require it by Executive order to be kept secret in the interest of the national defense or foreign policy. Now, that is very broad. That means that any of these documents that are of sufficient significance to the security of this Nation or to the interests of this Nation as it deals with other nations can, by appropriate designation, be excluded from the provisions of this act.
>
> We recognize that there are going to be certain needs to keep some of this information locked up. And the Executive order which is applicable in this instance I believe is Executive Order 10501, where the President authorizes the departments and agencies to appropriately classify and lays out the guidelines for classifica-

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[15] See also *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320-322; *Johnson* v. *Eisentrager*, 339 U.S. 763, 789; *Orloff* v. *Willoughby*, 345 U.S. 83; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-318.

> tion, which in my judgment are observed far more in the breach than in the performance. But, nevertheless, they are observed, and they are top secret, secret and confidential.
>
> * * * *
>
> The whole object of the Executive order is to have a category in which you can place and identify this information, so that it is secure.

See also material quoted from H. Rep. No. 1497, *supra*, p. 18.

In accordance with the Congressional purpose and the legal principles discussed above, two other courts have refused to reexamine the classifications made by the Executive Branch of documents relating to national security and foreign affairs. *Epstein* v. *Resor*, 421 F. 2d 930 (C.A. 9), certiorari denied, 398 U.S. 965; *Moss* v. *Laird* (D.D.C., Civil Action No. 1254-71, decided December 7, 1971, together with the consolidated case of *Fisher* v. *Department of Defense* (No. 1865-71).

In *Epstein* the plaintiff sought an Army File classified "Top Secret" pursuant to Executive Order 10501. The file had been compiled some twenty years earlier and dealt with forcible repatriation of Soviet citizens after World War II. The court of appeals held that Exemption 1 protected the material from disclosure and refused to order *in camera* inspection. It stated (421 F. 2d at 933):

> * * * The function of determining whether secrecy is required in the national interest is expressly assigned to the executive. The judi-

> cial inquiry is limited to the question whether an appropriate executive order has been made as to the material in question.
>
> This is not inconsistent with the legislative purpose. It simply recognizes the proposition that the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with. As has been stated, the judiciary has neither the "aptitude, facilities, nor responsibility" to review these essentially political decisions. Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111, 68 S. Ct. 431, 92 L. Ed. 568 (1948); *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320-322, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

Similarly, in *Moss*, the plaintiffs (two of whom were Congressmen) sought disclosure under the Act of portions of the "Pentagon Papers" that had been classified pursuant to Executive Order 10501 but had not been part of those materials made public in the *New York Times* litigation (*supra*, p. 22). The district court (per Judge Gesell) held that Exemption 1 protected these documents against disclosure and also refused to inspect them *in camera*. It stated (slip op. 3-4):

> * * * The determination of the interests of national defense or foreign policy cannot be made by applying some simple litmus test to a document presented, particularly in a case such as this where good faith is not in issue. The Court, with no experience or background in such mat-

> ters, would require detailed *ex parte* background briefing even to make a tentative judgment and thus the litigation would proceed in secret with those seeking the data wholly excluded.
>
> The Freedom of Information Act was not designed to open all Government files indiscriminately to public inspection. Obviously documents involving such matters as military plans and foreign negotiations are peculiary the type of documents entitled to confidentiality. The orderly processes of government and indeed the stability of the country itself so require. Congress recognized this in the Act and the Constitution has no requirement to the contrary * * *.

United States v. *Reynolds*, 345 U.S. 1, further supports the government's interpretation of Exemption 1. In *Reynolds*, the plaintiffs sought discovery, in a Tort Claims Act suit, of a secret Air Force report made in an investigation of the crash of the airplane in which their decendents had been killed. The airplane had been testing secret electronic equipment. The government declined to produce the report, asserting the privilege against revealing military secrets. The Court stated (p. 9) that, in passing upon a claim of this privilege, if the court is "satisfied from all the evidence and circumstances '* * * that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result' * * * the claim of the privilege will be accepted without requiring further disclosure" to permit examination of the material by the trial court. The Court ruled

(p. 10) that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission," and that where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged * * * the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers".

In light of the policy expressed by Congress in Exemption 1 of the Freedom of Information Act, we submit that documents relating to atomic testing that the Executive has classified Top Secret or Secret should not be examined by a court to determine whether portions thereof should nevertheless be disclosed. See *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325, 326, 331-332 (D.D.C.), affirmed, 384 F. 2d 379 (C.A. D.C.), certiorari denied, 389 U.S. 952; *Kaiser Aluminum Corp.* v. *United States*, 157 F. Supp. 939, 947, 948 (Ct. Cls.).

2. Courts are not well-equipped to make the decisions that the court of appeals has required the district court to make in this case. Whether a document requires a top secret or secret classification and whether that classification can safely be removed or changed, cannot be decided on the basis of simply reading the documents. Material that on its face seems relatively innocuous may, to one more familiar with the intricacy and subtlety of what is involved,

have an entirely different significance. See *supra*, pp. 26-27.

These considerations are equally, if not more, pertinent when the problem is declassifying portions of documents. Just as the significance of the entire document may depend upon extraneous factors, so the significance of the particular portion frequently can be undertsood only in the context of the entire situation. There may be many portions of documents which, standing alone, appear quite insignificant to the untrained observer, but whose disclosure would actually pose serious adverse consequences for national defense or foreign policy. The decision whether particular portions of top secret and secret documents can safely be made public requires the kind of expert knowledge and judgment that the courts simply do not possess.

The court of appeals relied on Section 3(c) of Executive Order No. 10501, which provides that a document shall be classified at the level of its highest component parts, and shall bear only a single classification even though portions thereof have different classifications (Pet. App. 27). This provision, however, is a mere housekeeping directive to government officials, designed to inform them that if a single document bears multiple classifications, the document as a whole must be classified and handled according to its highest classification. It does not undermine the argument we have made that Exemption 1 protects the confidentiality in their entirety of documents that the Executive has classified as "top secret" or "secret" pursuant to that Order.

The court of appeals did not announce any standards that the district court should follow in deciding whether to declassify portions of the documents. Apparently, it intended the district court to make its own independent judgment on whether it would be consistent with the interests of national defense or foreign policy if portions of particular documents were made public. This is not the kind of judgment the courts are well qualified to make, or should undertake to make. Congress did not intend the courts to make this judgment when it provided an exemption for disclosure of matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."

II

Exemption 5 of the Freedom of Information Act Covers Factual as Well as Policy Statements in Inter or Intra-Agency Memoranda

Exemption 5 of the Act exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency". This Exemption protects internal governmental documents that would not "routinely be disclosed to a private party through the discovery process in litigation with the agency" (H. Rep. No. 1497, at p. 10). See also "Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act" (1967) at 35. Exemption 5 thus incorporates the well-established principle that discov-

ery cannot be had of "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C.), affirmed, 384 F.2d 979 (C.A. D.C.), certiorari denied, 389 U.S. 952; *Ackerly* v. *Ley*, 420 F. 2d 1336, 1341 (C.A. D.C.).

The Exemption is based upon "two important policy considerations * * *: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers." *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358-1359 (C.A. 2), certiorari denied, 404 U.S. 827; *K.C.Wu* v. *National Endownment for Humanities*, C.A. 5, No. 71-2852, decided May 2, 1972. See also H. Rep. No. 1497 at 10; S. Rep. No. 813 at 9.

Exemption 5 exempts from disclosure all of the documents now involved in this litigation. As the affidavit of Under Secretary Irwin states, those documents were "prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose" (App. p. 29). They are precisely the kind of internal advisory memoranda that Exemption 5 was intended to protect from public disclosure.

The court of appeals held, however, that the district court should make an *in camera* inspection of the documents in order to make public any "factual data that can be disclosed without impinging on the policymaking decisional processes intended to be protected by this exemption" (Pet. App. 29); it stated that "while the exemption protects the decisional processes of the President, or other policy-making officials, it does not prevent the disclosure of factual information unless it is inextricably intertwined with policymaking processes" (*id.* at 28, footnote omitted). The language of the Exemption contains no exception, however, for factual material contained in the protected memoranda, and the legislative history shows that Congress intended the Exemption to cover documents containing factual as well as policy statements.

A. *The Legislative History Shows That Congress Intended Exemption 5 to Protect Against Disclosure of Inter or Intra-Agency Memoranda Containing Factual Statements.*

The genesis of Exemption 5 is found in Section 3 (c) of S. 1666, 88th Cong., 2d Sess. (1964), which exempted (110 Cong. Rec. 17086):

> the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rule-making matters.

At the Senate hearings on this and a related bill, a number of government officials urged that a broader

exemption covering material dealing with policy matters and not limited to adjudication or rule-making was needed.[16] The bill the Senate Committee reported contained a broader exemption. Section 3(c)(5) of the bill exempted (*ibid.*):

> intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy.

The Committee Report stated, however (S. Rep. No. 1219, 88th Cong. 2d Sess. (1964) at 7):

> All *factual* material in Government records is to be made available to the public, as well as *final* agency determinations on legal and policy matters which affect the public. [Emphasis in original.]

On the Senate floor, Senator Humphrey suggested that the section be amended to exempt "matters of fact" in internal memoranda. He argued (110 Cong. Rec. 17667):

> As presently written clause (5) of the amended Section 3(c) appears not to exempt intra-agency or interagency memorandums or letters dealing with matters of fact. For example, clause (5) would apparently not exempt memorandums prepared by agency employees for themselves or their superiors purporting to give their evaluation of the credibility of evidence obtained from witnesses or other sources. The knowledge

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[16] Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, on S. 1666 and S. 1663, 88th Cong., 1st Sess. (Oct., 1963), *e.g.*, pp. 202-203, 247.

that their views might be made public information would interfere with the freedom of judgment of agency employees and color their views accordingly. Memorandums summarizing facts used as a basis for recommendations for agency action would likewise appear to be excluded from the exemption contained in clause (5).

The Senate passed the bill without making the change Senator Humphrey suggested (110 Cong. Rec. 17668), but the House did not act upon the legislation during the 88th Congress.

When S. 1160, the bill which ultimately became the Freedom of Information Act, was introduced in the 89th Congress, it contained the same Exemption 5 as the Senate had passed in the 88th Congress. Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1160, S. 1336, S. 1758 and S. 1879, May 1965, 89th Cong. 1st Sess. (hereafter: "1965 Senate Hearings") at 7. During the Senate hearings on S. 1160 and similar bills, government officials and agencies again expressed concern that the exemption was not broad enough, *i.e.*, that the words "dealing solely with matters of law or policy" would not cover a memorandum containing both facts and opinions. *E.g.*, 1965 Senate Hearings, pp. 36, 94-95, 112-113, 205, 236-237, 244, 366-367, 383, 402-403, 406-407, 417, 437, 445-446, 450, 490.[17] In re-

[17] Among these statements were:

Commissioner Walrath of the Interstate Commerce Commission (pp. 236-237):

[Footnote continued on page 35]

sponse to these suggestions the Senate Committee further broadened Exemption 5 to cover:

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[17] [Continued]

> * * * Almost every internal memorandum that I might send to Commissioner Goff or he to me or staff to us in the course of a decisional process will necessarily not only deal with law and policy, usually, but it will necessarily deal with facts in issue. If those memorandums were to be considered not within the exemption and therefore available to the public, the result would be harmful to us. It would stifle the free interchange of views between us in the decisional process, which exchanges even courts have recognized are not for public consumption.

Department of Commerce, pp. 406-407 (emphasis in the original):

> Subsection (e)(5) exempts "interagency or intra-agency memorandums or letters dealing *solely* with matters or law or policy." Under this provision internal memorandums dealing with *mixed questions of fact, law and policy* could well become public information. We believe this subsection should be amended to exempt also such portions of interagency or intraagency memorandums or letters as deal with matters of law or policy. We believe that the provision as presently written would unduly inhibit agency personnel from freely expressing themselves, and consequently would result in decreased agency efficiency.

Federal Aviation Administration, p. 446:

> * * * Few records would be entirely devoid of factual data, thus leaving papers on law and policy relatively unprotected. Staff working papers and reports prepared for use within the agency or the executive branch would not be protected by the proposed exemptions. This would create problems in obtaining candid reports at various levels in an organization or in the Government, and would be deterimental to efficient staff operations.

> inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency.[18]

S. Rep. No. 813 at 1. The Senate Committee explained (S. Rep. No. 813, pp. 2, 9):

> The purpose of clause (5) is to protect from disclosure only those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency.
>
> * * * * *
>
> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

Shortly before the Senate hearings, a House subcommittee began hearings on similar legislation. Like the unamended version of S. 1160, Exemption 5 in the bills before the House subcommittee covered only

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[18] As enacted by P.L. 89-487, 80 Stat. 250, S. 1160 also defined "private party" as "any party other than an agency." Section 3(g), 80 Stat. 251. When the statute was codified by P.L. 90-23, 81 Stat. 54, this definition was incorporated into exemption (5) to give the present wording of 5 U.S.C. 552(b)(5), "available by law to a party other than an agency * * *."

materials "dealing solely with matters of law or policy." 1965 House Hearings at 3. Statements submitted to the subcommittee also indicated that the Exemption was not broad enough, since it would not cover factual material. *E.g.*, 1965 House Hearings, pp. 27-28; 49; 208; 220; 223-224; 229-240; 245-246; 255 and 256.[19]

The House Committee reported favorably the Senate bill, but with the same change in Exemption 5 that the Senate Committee had made. The House Report explained (H. Rep. No. 1497 at p. 10):

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[19] See, for example, these pertinent comments:

Bureau of the Budget, p. 208:

> * * * it is not apparent to us how there could be worthwhile discussion of law or policy unrelated to a specific set of facts. The effect of the above language would be to require disclosure of most Bureau records, even though they relate only to internal matters of a nonpublic nature.

Department of Defense, p. 220:

> * * * If agency decisions by superiors are to be made with the benefit of full, frank, and open discussion, and recommendations by and between subordinates, these comments and recommendations must have the protection of privileged information. Otherwise, every memorandum would be carefully written with a view toward its possible impact on the public. * * * The difficulty of writing a memorandum of law or policy without including factual matters would have the effect of either denying the privilege to many memorandums that should be protected or prompting artifical memorandums splitting, with factual memorandums cross-referenced to policy or legal memorandums on the same subject.

> Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material "which would not be available by law to a private party in litigation with the agency". Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public.

This legislative history shows that Congress, in response to criticism that the earlier drafts of Exemption 5 were too narrow because they did not cover documents containing factual as well as policy statements, broadened the exemption to cover such material. Nothing in the broader exemption Congress ultimately adopted indicates that the courts were to cull the factual portions from such documents and disclose them.

B. ***The Factual Portions of Memoranda that Exemption 5 Covers Should not be Disclosed.***

Sharp lines cannot ordinarily be drawn between the two categories of factual and policy material, and factual statements frequently blend into and become a part of policy recommendations. The making by subordinates of frank and often controversial recommendations would be inhibited unless the factual presentations and analyses upon which these recommendations were based were given the same protection against disclosure as the ultimate recommendations themselves.

The information upon which recommendations rest and which they reflect thus necessarily "is inextricably intertwined with policymaking processes" (Pet. App. 28). Contrary to the unstated assumption upon which the court of appeals based its decision, the two categories of material in a particular document cannot be broken down into such separate elements.

The need to protect the "policymaking decisional process" by avoiding disclosure that would inhibit the giving of candid advice—which the court of appeals recognized (*ibid.*)—is particularly important in this case. For here the recommendations were made and the information and its evaluation were submitted by top-level government officials directly to the President for his use in deciding whether to authorize a major nuclear test that had obvious important national defense and foreign policy implications. The President must have—and is entitled to have—complete candor from his advisers, and the latter

must be certain that the confidentiality of what they tell the President will be respected. It would, we submit, seriously interfere with the proper operation of the office of the President if any part of such material routinely could be made public under the Freedom of Information Act. Congress did not intend Exemption 5 to have that unfortunate effect.

C. *The Factual Material in These Documents Could Not Be Routinely Obtained in Discovery Proceedings.*

The court of appeals decision apparently rests to some extent upon its prior decisions in discovery proceedings directing *in camera* inspection of factual reports in government files in order to weigh a party's need to those reports against a governmental claim of privilege. See *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654 (C.A.D.C.); *Machin* v. *Zuckert*, 316 F. 2d 336 (C.A.D.C.), certiorari denied, 375 U.S. 896.[20] Assuming *arguendo* the correctness of those decisions and their applicability to the national security materials here involved (but cf. *United States* v. *Reynolds*, *supra*), they do not support the court's decision.

The standard for disclosure under Exemption 5 is whether the material would be "available by law to a party other than an agency in litigation with the

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[20] In *Soucie* v. *David*, 448 F. 2d 1067, 1077-1078 (C.A.D.C.), referred to in the opinion below on this point (Pet. App. 28), the court below made it clear that the principle of these discovery cases was the one upon which it relied to support its construction of Exemption 5.

agency." The question, however, is not whether a party could conceivably obtain a particular document through discovery, but whether it would "routinely be disclosed to a private party through the discovery process". H. Rep. No. 1497 at 10. The court below previously recognized this standard. In *Sterling Drug, Inc.* v. *Federal Trade Commission*, 450 F. 2d 698, 705 (C.A. D.C.), it stated:

> * * * The correct test for determining which documents are not exempt under § 552(b)(5) is given in the House Committee's report on the section, which states that "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1965). * * * The question for decision is thus whether " 'a private party' —not necessarily the applicant—would routinely be entitled to [the Commission memoranda] through discovery." [Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 796.] The clear answer is that he would not be so entitled. While some cases suggest that government memoranda containing legal analyses and recommendations may in some circumstances be subject to discovery, it is beyond question that granting discovery of such documents is a very extraordinary step, not a routine one. Accordingly, we conclude that the Commission memoranda in question here are the type which should be exempt under § 552(b)(5). [Footnote omitted.]

There can be no question that documents prepared solely to advise the President with respect to the making of a major nuclear test would not "routinely" be ordered disclosed in private litigation Cf. *United States* v. *Reynolds, supra.* Even apart from the problems of secrecy discussed in part one, there is thus no reason for an *in camera* inspection of these documents.

CONCLUSION

The judgment of the court of appeals should be reversed, and the judgment of the district court reinstated.

Respectfully submitted.

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APPENDIX A

The Freedom of Information Act, 5 U.S.C. 552, provides:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after

July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and

shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by,

on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

APPENDIX B

Executive Order 10501, as amended, 3 C.F.R. 292 (Jan. 1, 1971) provides in pertinent part:

EXECUTIVE ORDER 10501—SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES [AS AMENDED]

* * * *

WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and

WHEREAS the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows

Section 1. Classification categories. Official information which requires protection in the interests of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret,

or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. These categories are defined as follows:

(a) *Top Secret.* Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

(b) *Secret.* Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national de-

fense, or information revealing important intelligence operations.

(c) *Confidential.* Except as may be expressly provided by statute, the use of the classification Confidential shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation.

* * * *

Section 3. Classification. Persons designated to have authority for original classification of information or material which requires protection in the interests of national defense under this order shall be held responsible for its proper classification in accordance with the definitions of the three categories in section 1, hereof. Unnecessary classification and over-classification shall be scrupulously avoided. The following special rules shall be observed in classification of defense information or material:

(a) *Documents in General.* Documents shall be classified according to their own content and not necessarily according to their relationship to other documents. References to classified material which do not reveal classified defense information shall not be classified.

(b) *Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

(c) *Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

(d) *Transmittal Letters.* A letter transmitting defense information shall be classified at least as high as its highest classified enclosure.

* * * *

SEC. 7. *Accountability and Dissemination.* Knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy. Proper control of dissemination of classified defense information shall be maintained at all times, including good accountability records of classified defense information documents, and severe limitation on the number of such documents originated as well as the number of copies thereof reproduced. The number of copies of classified defense information documents shall be kept to a minimum to decrease the risk of compromise of the information contained in such documents and the financial burden on the Government in protecting such documents. The following special rules shall be observed in connection with accountability for and dissemination of defense information or material:

(a) *Accountability Procedures.* Heads of departments and agencies shall prescribe such ac-

countability procedures as are necessary to control effectively the dissemination of classified defense information, with particularly severe control on material classified Top Secret under this order. Top Secret Control Officers shall be designated, as required, to receive, maintain accountability registers of, and dispatch Top Secret material.

(b) *Dissemination Outside the Executive Branch.* Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production.

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